

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JORGE MIRANDA-RIVAS,

Petitioner,

v.

HAROLD WICKHAM, *et al.*,

Respondents.

Case No. 3:16-cv-00663-MMD-CLB

ORDER

I. SUMMARY

This is a habeas corpus action under 28 U.S.C. § 2254. Petitioner Jorge Miranda-Rivas seeks relief from his state judgment of conviction for one count each of robbery with the use of a firearm, discharging a firearm within or from a structure, grand larceny of a motor vehicle, and assault with a deadly weapon. Currently before the Court are the third amended petition (ECF No. 56), Respondents' motion to dismiss (ECF No. 58), Miranda-Rivas' opposition (ECF No. 66), and Respondents' reply (ECF No. 82). The Court finds that grounds 1, 2 and 4 do not relate back to the timely filed first amended petition (ECF No. 10), and the Court dismisses them. The Court finds that Miranda-Rivas has not exhausted his state-court remedies for grounds 10 and 12. Miranda-Rivas will need to decide what to do with those grounds. The Court thus grants the motion to dismiss in part.

II. BACKGROUND

After a jury trial, the state district court convicted Miranda-Rivas of one count each of robbery with the use of a firearm, discharging a firearm within or from a structure, grand larceny of a motor vehicle, and assault with a deadly weapon. (ECF No. 11-3.) Miranda-Rivas appealed, and on October 15, 2014, the Nevada Supreme Court affirmed. (ECF

1 No. 11-11.)

2 On August 25, 2015, Miranda-Rivas filed a proper-person post-conviction habeas
3 corpus petition in the state district court. (ECF No. 11-13.) The state district court denied
4 the petition on January 20, 2016. (ECF No. 11-15.) Miranda-Rivas appealed. On July 26,
5 2016, the Nevada Court of Appeals affirmed. (ECF No. 11-20.) Remittitur issued on
6 August 22, 2016. (ECF No. 11-21.)

7 On or around October 31, 2016, Miranda-Rivas either mailed, or handed to a
8 correctional officer for mailing, his initial habeas corpus petition under 28 U.S.C. § 2254
9 to this Court. (ECF No. 6.)¹ The Court appointed counsel. Miranda-Rivas filed a counseled
10 first amended petition on January 9, 2017. (ECF No. 10.) Miranda-Rivas filed a counseled
11 second amended petition on October 12, 2017. (ECF No. 23.)

12 On February 9, 2018, Miranda-Rivas filed a counseled second post-conviction
13 habeas corpus petition in the state district court. (ECF No. 37-24.) On June 26, 2018, the
14 state district court dismissed the petition. It found that the petition was untimely under
15 NRS § 34.726 and successive under NRS § 34.810. (ECF No. 37-32.) Miranda-Rivas
16 appealed.

17 Meanwhile, in this Court Respondents moved to dismiss the second amended
18 petition because it contained claims that were unexhausted or untimely. (ECF No. 35.)
19 Upon Miranda-Rivas' motion, the Court stayed the action pending the resolution of the
20 appeal of the dismissal of the second state petition. (ECF No. 46.)

21 On July 9, 2019, the Nevada Court of Appeals affirmed the state district court's
22 dismissal of the second state petition. (ECF No. 57-6.)

23 Miranda-Rivas then moved to reopen this action and to file a third amended
24 petition. (ECF Nos. 47, 52.) The Court granted the motions. (ECF No. 51, 55.) Miranda-
25 Rivas filed his third amended petition on January 9, 2020. (ECF No. 56.)

26
27 ¹The Court is uncertain about this date. Miranda-Rivas did state in the petition form
28 that he mailed, or handed to a correctional officer for mailing, his petition on October 31,
2016. (ECF No. 1-1 at 1.) However, the prison official who signed Miranda-Rivas' financial
certificate gave a date of November 1, 2016. (ECF No. 1 at 4.) Miranda-Rivas signed the
petition on November 14, 2016. (ECF No. 1-1 at 49.) However, for the purposes of the
one-year statute of limitation of 28 U.S.C. § 2244(d), all of these dates were timely.

III. LEGAL STANDARDS

A. Timeliness

Congress has limited the time in which a person can petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the Supreme Court of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of certiorari expires. *Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R. 13(1).

Any time spent pursuing a properly filed application for state post-conviction review or other collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-conviction judgment becomes final upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). A state post-conviction petition filed after expiration of the one-year period does not reinitiate the one-year period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). An untimely state post-conviction petition is not “properly filed” and does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). A prior federal habeas corpus petition does not toll the period of limitation. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

The petitioner effectively files a federal petition when he delivers it to prison officials

1 to be forwarded to the Clerk of Court. Rule 3(d), Rules Governing Section 2254 Cases in
2 the United States District Courts.

3 An amended federal habeas corpus petition “does not relate back (and thereby
4 escape [§ 2244(d)(1)’s] one-year time limit) when it asserts a new ground for relief
5 supported by facts that differ in both time and type from those the original pleading set
6 forth.” *Mayle v. Felix*, 545 U.S. 644, 650 (2005). Relation back is allowed “[s]o long as the
7 original and amended petitions state claims that are tied to a common core of operative
8 facts” *Id.* at 664.

9 **B. Exhaustion**

10 Before a federal court may consider a petition for a writ of habeas corpus, the
11 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To
12 exhaust a ground for relief, a petitioner must fairly present that ground to the state’s
13 highest court, describing the operative facts and legal theory, and give that court the
14 opportunity to address and resolve the ground. *See Duncan v. Henry*, 513 U.S. 364, 365
15 (1995) (per curiam); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

16 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available
17 state remedies only if he characterized the claims he raised in state proceedings
18 specifically as federal claims. In short, the petitioner must have either referenced specific
19 provisions of the federal constitution or statutes or cited to federal case law.” *Lyons v.*
20 *Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*, 247 F.3d
21 904 (9th Cir. 2001). Citation to state case law that applies federal constitutional principles
22 will also suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). “The
23 mere similarity between a claim of state and federal error is insufficient to establish
24 exhaustion. Moreover, general appeals to broad constitutional principles, such as due
25 process, equal protection, and the right to a fair trial, are insufficient to establish
26 exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

1 **IV. DISCUSSION**

2 **A. Timeliness**

3 The Nevada Supreme Court affirmed the judgment of conviction on October 15,
4 2014. The judgment of conviction became final on January 13, 2015, when the time to
5 petition for a writ of certiorari expired.

6 Miranda-Rivas filed his state post-conviction habeas corpus petition on August 25,
7 2015, 223 days later. The state post-conviction proceedings tolled the one-year period of
8 limitation under 28 U.S.C. § 2244(d)(2). The state post-conviction proceedings concluded
9 with the Nevada Supreme Court's issuance of the remittitur after the appeal on August
10 22, 2016, and the period of limitation resumed the next day.

11 Miranda-Rivas mailed his initial, proper-person federal habeas corpus petition
12 (ECF No. 6) to the Court between October 31, 2016, and November 14, 2016. On the
13 latter day, 306 non-tolled days had passed, and the initial petition was timely.

14 Miranda-Rivas filed his counseled first amended petition (ECF No. 10) on January
15 9, 2017. On that day, 362 non-tolled days had passed, and the first amended petition was
16 timely.

17 Miranda-Rivas' second state post-conviction petition, filed February 9, 2017, did
18 not toll § 2244(d)(1)'s period for two reasons. First, the period already had expired, and
19 nothing remained to be tolled. *Ferguson*, 321 F.3d at 823. Second, the state courts
20 determined that the second petition was untimely, and thus it was not properly filed to
21 qualify for tolling under § 2244(d)(2). *Pace*, 544 U.S. at 417.

22 Miranda-Rivas filed his counseled second amended petition (ECF No. 23) on
23 October 12, 2017. On that day, 638 non-tolled days had passed, and the second
24 amended petition was untimely.

25 Miranda-Rivas filed his operative, counseled third amended petition (ECF No. 56)
26 on January 9, 2020. On that day, 1,457 non-tolled days had passed, and the third
27 amended petition is untimely. The second amended petition cannot provide a basis for
28 relation back because it also is untimely. Consequently, grounds in the third amended

1 petition will need to relate back to the timely-filed initial or first amended petitions.

2 Respondents argue that grounds 1, 2, 4, 5, 6, and 12 do not relate back. The Court
3 finds that grounds 1, 2, and 4 do not relate back. The Court finds that grounds 5, 6, and
4 12 relate back.

5 **1. Ground 1 does not relate back**

6 Ground 1 has two components. First, Miranda-Rivas claims that the prosecution
7 failed to disclose material exculpatory evidence that prosecution witnesses received
8 material benefits in exchange for their testimonies. Second, Miranda-Rivas claims that
9 the prosecution either elicited false testimonies, or failed to correct false testimonies, from
10 the same witnesses about the benefits that they received in exchange for their
11 testimonies.

12 Briefly, Miranda-Rivas was charged with robbing a gas-station convenience store
13 and stealing a Subaru, both in Incline Village and Washoe County, Nevada. Kevin
14 Anguiano, Escar Gonzalez, and Jorge Torres also were charged with their involvement.
15 Each of them testified against Miranda-Rivas at trial. Anguiano testified that he had
16 pleaded guilty to robbery with a firearm and grand larceny. He further testified that he
17 received no promises in exchange for his testimony, that he would need to wait for
18 sentencing to know the outcome, but that he was hoping for a benefit. (ECF No. 36-26 at
19 92-96 (direct examination)); (ECF No. 52-3 at 33-35 (cross examination).) Gonzalez
20 testified that he pleaded guilty without any benefit in exchange for his testimony before
21 he testified in Miranda-Rivas' trial. (ECF No. 52-3 at 64-66.) Torres testified that in
22 exchange for his testimony, he would plead guilty to conspiracy to commit robbery and
23 intimidating a witness. (*Id.* at 112-13.)

24 In ground 1 of the third amended petition, Miranda-Rivas argues that the
25 prosecution did not disclose the true benefits that these witnesses received. Torres did
26 not plead guilty to intimidating a witness; he pleaded guilty only to conspiracy to commit
27 robbery. Miranda-Rivas could not find the records for Anguiano and Gonzalez—they were
28 juveniles at the time, and the courts might have sealed their records—but he believes that

1 they received benefits greater than their testimonies indicated.

2 Miranda-Rivas argues that ground 1 of the third amended petition relates back to
3 grounds 1, 4, 6, and 7 of the first amended petition. Ground 1 of the first amended petition
4 was a claim that trial counsel failed to investigate Anguiano, Gonzalez, and Torres,
5 because their testimonies conflicted with their prior statements to detectives. (ECF No.
6 10 at 12-13, 33-34.) Ground 4 of the first amended petition was a claim that trial counsel
7 failed to impeach the witnesses because “both co-defendants” agreed to plead to lesser
8 charges. (*Id.* at 15-16, 37-38.) Ground 6 of the first amended petition was a claim that trial
9 counsel failed to object to the testimonies of the witnesses because the prosecution
10 elicited the testimony through promises of reduced charges in exchange for their
11 testimonies. (*Id.* at 17-18, 39-40.) Ground 7 of the first amended petition was a claim that
12 trial counsel failed to move for a mistrial on the charge of grand larceny of a motor vehicle
13 because the only evidence for that charge came from the witnesses, who had favorable
14 plea agreements. (*Id.* at 18-19, 40-42.)

15 A reader might notice from the fragmented citations above that the first amended
16 petition is a combination of two documents. Counsel for Miranda-Rivas alleged grounds,
17 but the grounds themselves contained no facts. (See ECF No. 10 at 12-23.) Instead,
18 counsel incorporated by reference an earlier document, titled “Attachment to Habeas,”
19 written by Miranda-Rivas *pro se*. (See ECF No. 10 at 24-47.) Miranda-Rivas also included
20 this “Attachment to Habeas” in his initial petition. (ECF No. 6 at 25-48.) Miranda-Rivas
21 originally filed this “Attachment to Habeas” with his state post-conviction habeas corpus
22 petition. (ECF No. 11-13 at 16-39.) The “Attachment to Habeas” is identical in all these
23 petitions, except in the numbering of pages. Consequently, the first amended petition is
24 functionally identical to the initial petition, which in turn is functionally identical to the first
25 state post-conviction habeas corpus petition.

26 The Court agrees with Respondents that ground 1 of the third amended petition
27 does not relate back to the first amended petition. The grounds in the first amended
28 petition that Miranda-Rivas proposes for relation back are based upon favorable plea

1 agreements, and ground 1 of the third amended petition is based upon favorable plea
2 agreements. However, the facts underlying the claims are fundamentally different.
3 Ground 4 of the first state petition is factually the closest to ground 1 of the first amended
4 petition. It was a claim that trial counsel failed to impeach Anguiano, Gonzalez, and Torres
5 both with the favorable plea agreements that they received in exchange for their
6 testimonies and with other impeaching facts. Regarding the favorable plea agreements,
7 the state district court noted that Miranda-Rivas had not alleged any specific facts, and it
8 turned to the record. (ECF No. 11-15 at 10.) The state district court reviewed the
9 witnesses' testimonies about their pleas, which this Court has cited above, along with
10 other impeaching questions that trial counsel asked on cross-examination. (ECF No. 11-
11 15 at 10-11.) The state district court concluded that Miranda-Rivas did not show that
12 counsel had performed deficiently. (*Id.*) If Miranda-Rivas knew at the time that Anguiano,
13 Gonzalez, and Torres received even more favorable treatment than they had said, then
14 Miranda-Rivas did not bring those facts to the attention of the state district court. In the
15 first state post-conviction proceedings, all the facts about the plea agreements were the
16 facts to which Anguiano, Gonzalez, and Torres testified, and nothing else.

17 The Court is not stating that the first state petition can be a basis for relation back.
18 Rather, because the first state petition, the initial federal petition, and the first amended
19 federal petition are functionally identical, understanding the operative facts in the first
20 state petition is necessary to understanding the facts in the initial federal petition and the
21 first amended federal petition.

22 Then, in the initial federal petition, Miranda-Rivas included the "Attachment to
23 Habeas" as the main part of his petition. He also attached the state district court's order
24 denying the state post-conviction petition and the order of the Nevada Court of Appeals
25 order affirming that denial. (ECF No. 6 at 59-83.) Anyone reading the initial federal petition
26 would conclude that all the facts about the plea agreements were the facts to which
27 Anguiano, Gonzalez, and Torres testified.

28 Those facts continued onward into the first amended petition, which was

1 functionally identical to the initial federal petition and the first state petition. Again, the
2 petition included the “Attachment to Habeas” as the main part of the petition. Miranda-
3 Rivas filed more exhibits with his first amended petition. The exhibits relevant to plea
4 agreements were his first state petition (ECF No. 11-13), the state district court’s order
5 denying the petition (ECF No. 11-15), his proper-person fast-track statement on appeal
6 (ECF No. 11-18), and the order of the Nevada Court of Appeals affirming the denial.
7 Again, anyone reading the first amended petition and the relevant exhibits would conclude
8 that all the facts about the plea agreements were the facts to which Anguiano, Gonzalez,
9 and Torres testified.

10 Then, with the second amended petition (ECF No. 23) and later the third amended
11 petition (ECF No. 56), the facts changed. Now, Miranda-Rivas alleges that Anguiano,
12 Gonzalez, and Torres received even more favorable treatment than their testimonies
13 indicated, that they testified falsely, and that the prosecution hid the true details of the
14 plea agreements from the defense, the court, and the jury. These facts are fundamentally
15 different from what Miranda-Rivas alleged in the first amended petition and all preceding
16 petitions. Now, the operative facts have changed from the witnesses’ testimonies at trial
17 to secret plea agreements unknown to anyone except the prosecution and the witnesses.

18 Put another way, these new allegations fundamentally change how courts would
19 decide a failure-to-disclose claim. Hypothetically, if Miranda-Rivas raised a failure-to-
20 disclose claim based only upon the plea agreements as testified by Anguiano, Gonzalez,
21 and Torres, the claim would have been self-disproving. The prosecution did disclose their
22 plea agreements. Reading the trial transcript alone would be enough to conclude that the
23 claim would lack merit. In reality, ground 1 of the third amended petition requires
24 comparisons of the witnesses’ testimonies with their own court records. If the Court must
25 turn to three more state-court criminal cases to decide this claim, then the Court cannot
26 conclude that ground 1 of the third amended petition has facts the same in time and type
27 as the facts alleged in the first amended petition.

28 Ground 1 of the third amended petition does not relate back to the timely filed first

1 amended petition. The Court dismisses this ground.

2 **2. Ground 2 does not relate back**

3 In ground 2 of the third amended petition, Miranda-Rivas claims that trial counsel
4 provided ineffective assistance because trial counsel did not file a motion to suppress a
5 bullet found in a GMC Yukon belonging to Miranda-Rivas' mother. Miranda-Rivas further
6 claims that the search of the GMC Yukon violated the Fourth Amendment because,
7 although he was on parole at the time, a parole officer may not conduct or direct a
8 warrantless search when the parole officer operates at the direction of, or in concert with,
9 the police.

10 Miranda-Rivas argues that ground 2 of the third amended petition relates back to
11 ground 2 of the first amended petition. In that ground, in the "Attachment to Habeas,"
12 Miranda-Rivas alleged that counsel should have moved to suppress bullets because they
13 "had no direct link to Petitioner nor where there any physical evidence introduced showing
14 that at some point Petitioner had possession or control of them." (ECF No. 10 at 34-35.)²

15 Miranda-Rivas argues that the operative facts are the same, only the legal theory
16 of the Fourth Amendment because of the parole officer being used as a stalking horse is
17 different. The Court disagrees. The operative facts are different. Initially, Miranda-Rivas
18 argued that counsel should have moved to suppress the bullet because it had no
19 connection to him. Now, Miranda-Rivas argues that counsel should have moved to
20 suppress the bullet under the Fourth Amendment because the warrantless search was
21 improper. Even if both claims involved the bullet, the asserted reasons why counsel was
22 ineffective by not filing a motion to suppress, *i.e.*, the operative facts of the claims of
23 ineffective assistance of counsel, are different. Allegations about a warrantless search by
24 a parole officer appear nowhere in the first amended petition or the incorporated initial
25 petition. If Miranda-Rivas could change the reason why counsel provided ineffective
26 assistance, even if both claims involved the same bullet, then it would render the concept

27
28 ²Ground 2 of the first amended petition also alleged that counsel should have filed
a motion to suppress recordings of jail telephone calls and a blue jacket, neither of which
is relevant to ground 2 of the third amended petition.

of relation back in *Mayle v. Felix* useless. *Schneider v. McDaniel*, 674 F.3d 1144, 1151-52 (9th Cir. 2012). Ground 2 of the third amended petition does not relate back to the first amended petition. The Court dismisses ground 2.

3. Ground 4 does not relate back

Ground 4 is a claim that trial counsel provided ineffective assistance because trial counsel did not impeach Anguiano, Gonzalez, and Torres with the evidence of substantial benefits that they received in exchange for their testimony against Miranda-Rivas. Miranda-Rivas incorporates ground 1 into ground 4. (ECF No. 56 at 22.) He alleges that trial counsel never asked for or produced documentation of Anguiano's plea agreement, that trial counsel never asked Gonzalez about any benefit that he received for his testimony, and that trial counsel never questioned Torres about his guilty plea, which differed from Torres' testimony about the plea. (ECF No. 56 at 23.)

As with ground 1, the operative facts have changed. Miranda-Rivas is not alleging in ground 4 that counsel failed to impeach the witnesses with the plea agreements to which they testified at trial. By incorporating ground 1 into ground 4, Miranda-Rivas is alleging that counsel failed to obtain and impeach the witnesses with the plea agreements that the state failed to disclose, as alleged in ground 1. That is a different operative fact from what Miranda-Rivas presented in the first amended petition. Ground 4 of the third amended petition does not relate back to the first amended petition. The Court dismisses ground 4.

4. Ground 5 relates back

In ground 5, Miranda-Rivas claims that trial counsel provided ineffective assistance because trial counsel did not move for a mistrial or judgment of acquittal on the charge of grand larceny of a motor vehicle because, under NRS § 175.291, no corroborating evidence independent of the testimony of the accomplices Anguiano, Gonzalez, and Torres existed to convict him. (ECF No. 56 at 24-26.) Miranda-Rivas presented the same claim in ground 7 of the first amended petition. (ECF No. 10 at 18-19, 40-42.)

Miranda-Rivas alleges facts in ground 5 of the third amended petition that he did

1 not allege in ground 7 of the first amended petition. However, the Court disagrees with
2 Respondents that these facts are different in time and type from what Miranda-Rivas
3 alleged in the first amended petition. Both claims share the common core of operative
4 fact that no independent evidence corroborated the accomplices' testimonies to find him
5 guilty in accordance with NRS § 175.291. Ground 5 relates back to the first amended
6 petition.

7 **5. Ground 6 relates back**

8 Ground 6 of the third amended petition is a claim that trial counsel provided
9 ineffective assistance because trial counsel did not seek to sever the charge of grand
10 larceny of a motor vehicle from the other three charges. (ECF No. 56 at 26-28.) Miranda-
11 Rivas presented the same claim in ground 8 of the first amended petition. (ECF No. 10 at
12 19-20, 42-43.)

13 Miranda-Rivas alleges facts in ground 6 of the third amended petition that he did
14 not allege in ground 8 of the first amended petition. However, the Court disagrees with
15 Respondents that these facts are different in time and type from what Miranda-Rivas
16 alleged in the first amended petition. Both claims share the common core of operative
17 fact that Miranda-Rivas wanted the grand larceny charge severed because it had nothing
18 to do with the other three charges. Ground 6 relates back to the first amended petition.

19 **6. Ground 12 relates back in part**

20 Ground 12 of the third amended petition is a claim of cumulative error. (ECF No.
21 56 at 38-39.) Ground 10 of the first amended petition also is a claim of cumulative error.
22 (ECF No. 10 at 21-22, 45.) The difference is that ground 10 of the first amended petition
23 is a claim of cumulative error based upon all the claims of ineffective assistance of counsel
24 in the first amended petition. Ground 12 of the third amended petition is a claim of
25 cumulative error based upon all the claims raised in that petition, which include claims of
26 ineffective assistance of counsel and claims of trial-court error.

27 The Court disagrees with Respondents that ground 12 of the third amended
28 petition does not relate back because it differs from ground 10 of the first amended

1 petition. Each claim of cumulative error incorporates the claims raised in their respective
2 petitions. The question is not whether a claim of cumulative error relates back to an earlier
3 claim of cumulative error, but whether the facts underlying ground 12 of the third amended
4 petition themselves relate back to the first amended petition. The Court has ruled that
5 grounds 1, 2 and 4 of the third amended petition do not relate back. Consequently, they
6 also would not be considered as part of the cumulative-error claim in ground 12 of the
7 third amended petition. The other grounds in the third amended petition do relate back,
8 and they can be considered as part of the cumulative-error claim.

9 **B. Procedural Default**

10 Respondents argue that Miranda-Rivas has procedurally defaulted grounds 1, 2,
11 and 4 of the third amended petition because, in his second state post-conviction
12 proceedings, the state courts determined that the corresponding grounds were untimely
13 under NRS § 34.726 and successive under NRS § 34.810. The Court will not address
14 these arguments because the Court is dismissing grounds 1, 2, and 4 as untimely.

15 **C. Exhaustion**

16 Respondents argue that Miranda-Rivas has not exhausted his state-court
17 remedies for grounds 5, 6, 7, 8, 10, and 12. The Court agrees that Miranda-Rivas has not
18 exhausted grounds 10 and 12. However, Miranda-Rivas has exhausted grounds 5, 6, 7,
19 and 8.

20 **1. Grounds 5, 6, 7, and 8 are exhausted**

21 Respondents' arguments that Miranda-Rivas has not exhausted grounds 5, 6, 7,
22 and 8 are effectively the same—that Miranda-Rivas presented similar claims in his first
23 state post-conviction habeas corpus petition, but he alleges facts now that he did not
24 allege in that state petition. Having reviewed all four grounds, the Court's conclusion is
25 the same as to each. The additional facts alleged in grounds 5, 6, 7, and 8 do not
26 fundamentally alter the claims from what Miranda-Rivas presented to the state courts.
27 Grounds 5, 6, 7, and 8 are exhausted. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).
28

1 **2. Ground 10 is unexhausted**

2 In ground 10, Miranda-Rivas claims a misjoinder of charges, that the charge of
3 grand larceny of a motor vehicle should not have been added to the other three charges.
4 In his supplemental fast-track statement on direct appeal, Miranda-Rivas noted that he
5 had filed no motion to sever the charges, but he argued that the trial court plainly erred
6 by not severing the charges on its own. (ECF No. 11-8 at 7-9.) Miranda-Rivas did not
7 argue in that brief that the failure to sever violated any provision of federal constitutional
8 law.

9 Miranda-Rivas argues now that he cited *Tabish v. State*, 72 P.3d 584, 590-91 (Nev.
10 2003), which cited *Mitchell v. State*, 782 P.2d 1340, 1342 (Nev. 1989), which in turn cited
11 *Robinson v. United States*, 459 F.2d 847, 856 (D.C. Cir. 1972). The Court agrees with
12 Respondents that, notwithstanding *Peterson*, 319 F.3d at 1158, the chain of citations to
13 a decision of a federal court of appeals is too attenuated to bring a federal-law issue to
14 the state court's attention. Additionally, *Robinson* is a federal criminal appeal. The District
15 of Columbia Circuit did not cite any principle of federal constitutional law or any provision
16 of federal statutory law regarding misjoinder that is applicable to the states. The court of
17 appeals was acting in its supervisory capacity. Consequently, *Robinson* does not serve
18 to make a federal-law issue out of ground 10.

19 Respondents also argue that, by incorporating ground 9, Miranda-Rivas added the
20 fact that the evidence was insufficient to support the grand-larceny charge. This additional
21 fact does not fundamentally alter the claim. Indeed, on direct appeal Miranda-Rivas
22 conceded the strength of the evidence in support of armed robbery but argued that the
23 evidence in support of the grand larceny was non-existent, thus leading to prejudicial
24 misjoinder. (ECF No. 11-8 at 9.) Additionally, the Nevada Supreme Court held that there
25 was sufficient independent evidence to corroborate the accomplices' testimony and to
26 support the conviction of grand larceny of a motor vehicle. (ECF No. 11-11 at 5.) The
27 incorporation of ground 9 does not make ground 10 unexhausted.

28 However, the failure to make the misjoinder claim a matter of federal law does

1 make ground 10 unexhausted.

2 **3. Ground 12 is unexhausted**

3 Ground 12 is a claim of cumulative error. The cumulative-error claim that Miranda-
4 Rivas presented in state court was solely a claim that the cumulative effect of instances
5 of ineffective assistance of counsel warranted relief. (ECF No. 11-13 at 37.) Ground 12,
6 in contrast, adds the claims of trial-court error in the third amended petition to the
7 cumulative-error claim.

8 Miranda-Rivas first argues that cumulative-error claims are exempt from
9 § 2254(b)'s requirement of exhaustion. No such exemption appears in the statute, and
10 Miranda-Rivas cites no court decision to that effect. To the contrary, the Ninth Circuit has
11 affirmed district-court rulings that petitioners must exhaust cumulative-error claims. See
12 *Wooten v. Kirkland*, 540 F.3d 1019, 1026 (9th Cir. 2008); *Solis v. Garcia*, 219 F.3d 922,
13 930 (9th Cir. 2000).

14 Miranda-Rivas also argues that because he exhausted all his other claims, they
15 are properly before this Court and can be part of a cumulative error claim. This argument
16 is similar to the reason why the Court found that ground 12 of the third amended petition
17 relates back to the first amended petition to the extent that the other claims in the third
18 amended petition relate back to the first amended petition. The difference is that relation
19 back looks only to whether claims share a common core of operative fact with claims in
20 an earlier, timely federal petition. Exhaustion requires Miranda-Rivas to give the state
21 courts the opportunity to rule on the merits of a claim—both legal theory and facts—before
22 the federal court may rule on the merits of the claim. By presenting a claim of cumulative
23 error that included only claims of ineffective assistance of counsel to the state courts,
24 Miranda-Rivas did not give the state courts that opportunity. Ground 12 is unexhausted.

25 **4. Petitioner will need to decide what to do with the unexhausted** 26 **grounds**

27 The third amended petition (ECF No. 56) is mixed. Miranda-Rivas has not
28 exhausted his state-court remedies for grounds 10 and 12. The third amended petition

1 thus is subject to dismissal. See *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v.*
2 *Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983).

3 **V. CONCLUSION**

4 It is therefore ordered that Respondents' motion to dismiss (ECF No. 58) is granted
5 in part. Grounds 1, 2, and 4 are dismissed from this action with prejudice because they
6 are untimely. Grounds 10 and 12 are unexhausted.

7 It further is ordered that Petitioner will have 30 days from the date of entry of this
8 order to file a motion for dismissal without prejudice of the entire petition, for dismissal of
9 grounds 10 and 12, or for other appropriate relief. Within 10 days of filing such motion,
10 Petitioner must file a signed declaration under penalty of perjury pursuant to 28 U.S.C. §
11 1746 that he has conferred with his counsel in this matter regarding his options, that he
12 has read the motion, and that he has authorized that the relief sought therein be
13 requested. Failure to comply with this order will result in the dismissal of this action.

14 It further is ordered that if Petitioner elects to dismiss grounds 10 and 12 of his
15 third amended petition (ECF No. 56) and proceed on the remaining grounds,
16 Respondents must file and serve an answer, which must comply with Rule 5 of the Rules
17 Governing Section 2254 Cases in the United States District Courts, within 60 days after
18 Petitioner serves his declaration dismissing those grounds. Petitioner will have 30 days
19 from the date on which the answer is served to file and serve a reply.

20 DATED THIS 30th day of September 2020.

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23 MIRANDA M. DU
24 CHIEF UNITED STATES DISTRICT JUDGE
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